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No. 96-904

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In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN R. ZIMMERMAN, THERESA TARP ZIMMERMAN, PAUL TARP, AND MELBA STOPELLO, PETITIONERS

v.

VOLKSWAGEN OF AMERICA, INC., AND VOLKSWAGEN AKTIENGESELLSCHAFT, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Idaho correctly concluded that petitioners' tort claim, which alleged that respondents' 1987-model automobile was defectively designed because it was equipped with a "passive" occupant restraint system that did not include a "manual" lap belt, was expressly preempted by the National Traffic and Motor Vehicle Safety Act because the claim conflicted with Federal Motor Vehicle Safety Standard 208.

RULE 29.6 STATEMENT

Respondent Volkswagen AG (sued as Volkswagen Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AutoEuropa Automoveis Lda.
AUTOGERMA S.p.A.
Chinchun Motor Co., Ltd.
Coordination Center Volkswagen S.A.
Dead Sea Magnesium Ltd.
Europcar International S.A.
FAW-Volkswagen Automotive Company, Ltd.
FINGERMA S.p.A.
Groupe VOLKSWAGEN France s.a.
Seat Deutschland GmbH
SEAT, S.A.
Shanghai-Volkswagen Automotive Company Ltd.
SKODA Automobile Deutschland GmbH
SKODA, autmobilova a.s.
SkoFIN s.r.o.
Svenska VOLKSWAGEN AB
Volkswagen Argentina S.A.
Volkswagen Asia-Pacific Ltd.
Volkswagen Bank GmbH
Volkswagen Bruxelles S.A.
Volkswagen Canada, Inc.
Volkswagen Comercio e Participacoes Ltda.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen do Brasil Ltda.
Volkswagen Finance Japan K.K.

VOLKSWAGEN FINANCE S.A.
VOLKSWAGEN FINANCE, S.A.
Volkswagen Financial Services (UK) Ltd.
Volkswagen Financial Services AG
Volkswagen Financial Services N.V.
Volkswagen Financial Services, S.A. de C.V.
VOLKSWAGEN Group Japan K.K.
VOLKSWAGEN Group United Kingdom Ltd.
Volkswagen International Finance N.V.
Volkswagen Investments Ltd.
Volkswagen Leasing GmbH
Volkswagen Navarra, S.A.
Volkswagen of South Africa (Pty.) Ltd.
Volkswagen Poznan Sp. z.o.o.
VOLKSWAGEN Synko GmbH
Volkswagen Transport GmbH & C.OHG
VOTEX GmbH
VW Credit, Inc.
VW-Gesellschaft fur technische
Datenverarbeitungssysteme mbH

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of a single, factbound question (Pet. i, 7): whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act or Act),[1] expressly preempts a state common-law tort claim that an automobile was defectively designed because its fully "passive" occupant restraint system, which complied with all federal safety requirements, did not have a "manual" lap belt. The Supreme Court of Idaho held that petitioners' tort claim was expressly preempted by the Safety Act, because it conflicted with Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208.

As petitioners explain (see Pet. 7-16), the lower courts over the past decade have decided a large number of preemption disputes arising from challenges to the use of passive restraint systems. Virtually all of these cases, however, have involved the question whether the claim that an automobile was defective because it lacked an *airbag* was *impliedly* preempted by FMVSS 208. The decision below, by contrast, is limited (i) to the factually distinct (and uncommon) claim that an automobile should have had a *manual lap belt* in addition to a "passive" seat belt system; and (ii) to the legal issue of *express* preemption under the Safety Act. Thus, even if this Court were inclined to enter the debate over the preemptive effect of FMVSS 208 — and it has denied review of such decisions on ten different occasions, including as recently as last Term — this would be a most atypical and inappropriate case.

In any event, review of the decision below is clearly not warranted because there is no conflict in the lower courts on the precise legal issue presented by the facts of this case.

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[1] For ease of reference we refer to the prior codification of the Safety Act, which is cited in the petition (Pet. 7) and in the opinions of the courts below (Pet. App. 3, 5, 14).

Moreover, the express preemption ruling of the Idaho Supreme Court is fully consistent with prior decisions of this Court.

STATEMENT

A. The Safety Act And FMVSS 208

1. Congress enacted the Safety Act in 1966 to protect the public against the "unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against [the] unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Another provision of the Act added a so-called "savings" clause, which provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 89-1301, at 4 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2709, 2712. The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Rep. No. 89-1776, at 17 (1991). As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

2. In exercising the Secretary of Transportation's authority under the Safety Act, the National Highway Traffic Safety Administration (NHTSA) has promulgated numerous standards on motor vehicle design and performance. At issue in this case is FMVSS 208, the occupant restraint standard, which addresses the "requirements for the protection of vehicle occupants in crashes" (49 C.F.R. § 571.208, S1). FMVSS 208 was promulgated by NHTSA in 1967 to require manual seat belts in all new automobiles. 32 Fed. Reg. 2415 (1967).

Because automobile users often failed to buckle their manual seat belts, however, NHTSA soon began to consider the feasibility of "passive" restraint systems, including automatic seat belts and airbags.[2] The decision whether and when to require the installation of such passive restraints has been the subject of extensive study, controversy, and modifi-

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[2] "Passive" restraints are "devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-35 (1983).

cations over the last three decades by NHTSA, Congress, and the courts. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).[3] Most of the debate, analysis and litigation in the years since the adoption of FMVSS 208 — which culminated in a significant amendment of the Standard in 1984 by Secretary of Transportation Elizabeth Dole — has concerned the safety, utility, and public acceptability of airbags. See *Motor Vehicle Mfrs.*, 463 U.S. at 34-38, 46-51; *State Farm*, 802 F.2d at 477-478, 487-489.

As amended in 1984, FMVSS 208 called for the gradual "phase-in" of passive restraint systems (either airbags or automatic seat belts) in automobiles over a four-year period beginning with the 1987 model year: 10% of automobiles manufactured between September 1, 1986, and August 31, 1987, were required to have passive restraints. 49 C.F.R. § 571.208 S4.1.3.1.2; 49 Fed. Reg. 28962, 28999-29000 (1984). Secretary Dole explained that the phase-in was necessary because of "the need for the public to become accustomed to the technology and the need for protection, and [because] an across-the-board mandate too quickly could engender adverse public reaction." *Id.* at 28989.

The Secretary's amendment of FMVSS 208 was premised on numerous safety concerns, including doubts about the efficacy of airbags (particularly in smaller cars in which the minimal space between the front of the car and the passenger leaves little time for the bag to inflate, 49 Fed. Reg. at 28974, 29001) and apprehension that the high cost of airbags would lead owners not to replace them after deployment, with

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[3] For example, between 1969 and 1976, the federal government conducted over 2,000 tests of occupant restraint devices to evaluate their utility. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

the result that there "would be no protection for the front seat occupants of such" automobiles. *Id.* at 29001.

To allay public concerns, Secretary Dole encouraged manufacturers to offer consumers a choice between automatic (*i.e.*, fully passive) safety belts and airbags. The Secretary noted that "[i]t may be easier to overcome these [public] concerns if airbags are not the only way of complying with an automatic occupant protection requirement. Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts." 49 Fed. Reg. at 29001.

Moreover, the Secretary concluded that FMVSS 208 should give manufacturers a choice among design options, because a rule requiring the installation of a particular passive restraint device would stifle innovation in occupant protection systems (49 Fed. Reg. at 29001):

> [The Department] believes that by taking away the manufacturers' discretion to comply with an automatic occupant restraint requirement through the use of a variety of technologies, it creates a number of problems. First, by restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. * * * Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a rule mandating a particular restraint device would be contrary to federal safety policy and goals.

The 1984 revision of FMVSS 208 was affirmed on judicial review in *State Farm*, 802 F.2d at 487-489. The D.C. Circuit noted that the Secretary's decision rested on a meticulous weighing of competing interests. *Id.* at 487-488 & n.27. The court held that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of

an agency'" and affirmed the conclusion that public concerns about passive restraints could "best be addressed through real-world experience in the marketplace rather than by regulatory fiat." *Id.* at 488.

In 1991, Congress amended the Safety Act to require NHTSA to modify FMVSS 208 to mandate airbags in 95% of 1997-model automobiles and 100% of 1998 models. Pub. L. No. 102-240, § 2508, 105 Stat. 2086.[4] Nonetheless, the debate over airbag technology and safety continues to the present day: NHTSA recently announced the need to implement "a comprehensive plan of rulemaking and other actions * * * addressing the *adverse* effects of airbags." 62 Fed. Reg. 798 (1997) (emphasis added). Specifically, NHTSA noted that "while passenger side air bags are estimated to have saved 164 lives to date, they have also killed 32 children in relatively low speed collisions. Eighteen of those deaths" occurred in 1996. *Ibid.*

3. At the time the 1987 Volkswagen Golf at issue in this case was built, FMVSS 208 provided three design "options" for occupant restraint systems and performance requirements for each:

1. Complete passive protection for all crashes (S4.1.2.1);
2. Passive restraints for head-on crashes (S4.1.2.2); or
3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave manufacturers a choice among any one of these three designs, subject to the requirement that they equip no less than 10% of their 1987 models sold in the

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[4] In passing this legislation, Congress noted that it did not seek to change the preemptive effect of FMVSS 208 for automobiles manufactured without airbags *before* they were required by federal law. Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086.

United States with fully passive occupant restraint systems (S4.1.3.1.2).

The second option under FMVSS 208, which was selected for the 1987 Golf, protected automobile occupants "by means that require no action by [the] occupants * * *" (49 C.F.R. § 571.208, S4.1.2.2(b)).[5] The regulations expressly provided that "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could comply with FMVSS 208 by installing passive seat

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[5] The second design option in FMVSS 208 provided in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;
>
> (c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and
>
> (d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

See also 49 C.F.R. § 571.208, S4.5.3.

belts that met the performance requirements of any of the three restraint system design options with no manually activated seat belts at all.

B. Factual And Procedural Background

Dorothy Zimmerman was killed in an automobile accident in March 1989 while driving a 1987 Golf, which was manufactured by respondents Volkswagen of America, Inc., and Volkswagen AG (sued as Volkswagen Aktiengesellschaft) (collectively Volkswagen). Pet. App. 2. Petitioners, surviving members of Zimmerman's family, sued Volkswagen in Idaho state court, alleging that the 1987 Golf was "defectively designed because it lacked a driver's-side lap belt," and that, "if the car had not been defectively designed, Ms. Zimmerman would have survived the crash." Pet. 4.

The occupant restraint system in the 1987 Golf, "identified by its acronym VWRA, is a 'passive' system requiring no action on the part of the occupant to actuate it." Pet. App. 4. It consists of (*id.* at 4-5):

> a shoulder belt which is anchored to the seat on the inboard side and to the door on the outboard side and includes a padded knee bar under the dash and a specially designed seat to minimize submarining. There is no lap belt and, when the door closes, the shoulder belt is automatically positioned across the occupants's chest.

Petitioners conceded that the fully passive VWRA system complied with the second option under FMVSS 208 by protecting vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[6] They maintained, however, that the VWRA

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[6] NHTSA expressly determined in 1974 that Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manual seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834

system was defective under state tort law because it did not have a manual lap belt. Pet. App. 5.

On Volkswagen's motion for summary judgment, the trial court held that petitioners' tort claims were preempted by the Safety Act. Pet. App. 14-15. "Because plaintiffs' claims would impose a state law requirement that differs from the explicit passive restraint option granted by the" Safety Act and FMVSS 208, the court held that "those claims are expressly preempted." *Id.* at 14. The court also held that petitioners' claims are impliedly preempted because they "would frustrate the federal policies and purposes of the Safety Act, Safety Standard 208 and the federal regulatory scheme by upsetting the careful balancing of safety considerations on which the Secretary of Transportation's decision to grant passive restraint options rested." *Id.* at 15.

C. The Idaho Supreme Court's Decision

On appeal, the Supreme Court of Idaho affirmed the summary judgment for Volkswagen, concluding that petitioners' "claims against Volkswagen for failure to include a lap belt with the VWRA are preempted by the express preemption provisions of the Safety Act." Pet. App. 7. The court held that the preemption provision of the Act (Section 1392(d)) includes within its scope "common law claims" and that the "general savings clause" in Section 1397(k) cannot be read "to permit common law actions that undermine federal policy * * * [and] conflict with federal law * * *." Pet.

(1974); see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). Since then, three Secretaries of Transportation have approved (and lauded) the use of the automatic seat belts in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).

App. 7-8. Because the court decided that petitioners' claims were expressly preempted, it did "not address Volkswagen's contention that these claims are impliedly preempted * * *." Pet. App. 8.

REASONS FOR DENYING THE PETITION

The petition presents a narrow, factbound issue for review by this Court: whether the Safety Act and FMVSS 208 *expressly* preempt a tort claim that an automobile was defective because its fully passive occupant restraint system did not include a *manual lap belt*. Petitioners seek to convert this modest, non-certworthy issue into a more substantial one by focusing almost entirely on a quite different question: whether the Safety Act and FMVSS 208 *impliedly* preempt a tort claim that an automobile was defective because it lacked an *airbag*. But that issue, on which two state courts of last resort have diverged from the unanimous view of the federal courts of appeals, is not presented in this case.

Instead, the question presented here has been addressed by only a handful of lower courts — and not by a single federal court of appeals. Moreover, the decision by the Supreme Court of Idaho does not conflict with the decision of any other state supreme court. And, in any event, the express preemption decision in this case is correct. There is therefore no reason to grant the petition.

A. There Is No Conflict In The Lower Courts Over The Question Whether FMVSS 208 Preempts "No Lap Belt" Claims

Contrary to the assertion at the outset of petitioners' lead argument (Pet. 7), there is not a "growing conflict among the federal courts of appeal[s] and the state courts of last resort over" the question presented in this case: whether the Safety Act expressly preempts "no lap belt" claims. Petitioners cite only five other cases that have ever considered the issue

whether "no lap belt" claims are preempted — either expressly or impliedly — by the Safety Act and FMVSS 208.[7]

To create the illusion of mass confusion in the lower courts over the question presented here — and to raise the specter of "thousands of automobile design defect lawsuits pending throughout the nation" (Pet. 15) — petitioners combine the very large number of decisions on the question whether "no airbag" claims are preempted by FMVSS 208 with the handful of "no lap belt" cases. "In comparison with no-airbag cases," however, "there are few preemption cases dealing with seatbelts anywhere." *Alvarado* v. *Hyundai Motor Co.*, 908 S.W.2d 243, 250-251 (Tex. App. 1995), app. pending, No. 95-0969 (Tex.). In fact, *no* federal court of appeals has addressed the "no lap belt" preemption issue and only *one* other state supreme court — the Arizona Supreme Court in *Hernandez-Gomez* v. *Leonardo*, 917 P.2d 238 (Ariz. 1996) — has decided that question.

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[7] Petitioners cite (Pet. 15-16): *Hernandez-Gomez* v. *Leonardo*, 917 P.2d 238 (Ariz. 1996) (no lap belt, no preemption in roll-over accident); *Ketchum* v. *Hyundai Motor Co.*, 57 Cal. Rptr.2d 595 (Cal. App. 1996) (no lap belt claim not preempted); *Alvarado* v. *Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995), app. pending, No. 95-0969 (Tex.) (no lap belt claim not preempted); *Dykema* v. *Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. App. 1994), cert. denied, 116 S. Ct. 60 (1995) (no lap belt claim preempted); *Miranda* v. *Fridman*, 647 A.2d 167 (N.J. App.), certif. denied, 649 A.2d 1291 (N.J. 1994) (no lap belt claim preempted).

Of the decisions cited by petitioners, only two (*Ketchum* and *Alvarado*) decide the express preemption issue presented in this case contrary to the result reached by the Idaho Supreme Court. And both *Ketchum* and *Alvarado* are now under review by their state's supreme court.

Moreover, the *Hernandez-Gomez* decision, in which the court held that there was no preemption of the particular "no lap belt" claim asserted (917 P.2d at 246), is limited explicitly to roll-over accidents. The court acknowledged that there could be implied conflict preemption of common law tort claims under the Safety Act. *Id.* at 245. Focusing on the "specific facts" of the case, however, the court noted that "the option Volkswagen chose — S4.1.2.2(b) — applies only to the performance requirement of the restraint system in a frontal crash." *Id.* at 246. As a result, the court concluded that (*ibid.*):

> Volkswagen could argue that a state common-law tort claim, which alleges that a defective design failed to protect occupants in front-end accidents, is preempted if federal regulatory requirements for performance in front-end accidents were met. Volkswagen cannot, however, make that preemption claim with regard to rollover accidents because the federal standard it chose did not address design or performance requirements for that type of accident.

Thus, the holding of *Hernandez-Gomez* is, by its own terms, applicable *only* to the unusual claim (not asserted by petitioners here) that an automobile involved in a roll-over accident was defective because it lacked a manual lap belt. That decision creates no conflict with this case.[8]

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[8] By the same token, the early case law interpreting the Safety Act cited by petitioners (Pet. 8-11) is irrelevant to the question whether "no lap belt" claims are expressly preempted by FMVSS 208. In virtually all of the cases cited, preemption was not at issue and the word "preemption" does not even appear in the courts' opinions. The cases merely confirm that compliance with a Federal Motor Vehicle Safety Standard does not constitute a defense to a product liability action if no FMVSS governs the specific design feature alleged by the plaintiff to be defective — *i.e.*, the Act does not preempt the entire field of motor vehicle safety. See, *e.g.*,

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Schwartz v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983) ("there were no federal standards governing the relevant portions of the" vehicle); *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSSs "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"), cert. denied, 459 U.S. 880 (1982); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976). Indeed, many of the cited cases involved allegations of defects in vehicles designed and manufactured before *any* pertinent federal Safety Standards had been promulgated.

Perhaps most important, none of the cases cited involved passive restraints. In fact, petitioners cite decisions rendered by courts that subsequently held that common law tort claims were preempted by FMVSS 208. Compare, *e.g.*, *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990) ("no airbag" claim preempted), with *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) (compliance with FMVSS was not complete defense to claim that vehicle was defective because of noncontinuous body frame); and *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), cert. denied, 117 S. Ct. 61 (1996) ("no airbag" claim preempted), with *Fox* v. *Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) (compliance with federal safety standards was not complete defense to claim that rear-seat lap safety belt was defectively designed).

Several of the early tort suits involved the claim that a motor vehicle's roof was improperly designed. Although FMVSS 216 prescribes "a minimum level of roof strength," *Sours* v. *General Motors Corp.*, 717 F.2d 1511, 1516-1517 (6th Cir. 1983), it does not prescribe any design features, *id.* at 1516, and thus there is no conflict between the federal performance standard and a defective design claim for a particular vehicle's roof. See also *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp* v. *General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985). As the Sixth Circuit noted in *Sours*, "utilization of officially approved design features * * * is far different from compliance with the threshold FMVSS 216 standard, which by its terms sets only a minimum

In sum, the Idaho Supreme Court's decision on express preemption of "no lap belt" claims under the Safety Act does not conflict with *any* decision of *any* state supreme court or *any* federal court of appeals.

B. The Narrow Decision In This Case On Express Preemption Of "No Lap Belt" Claims Does Not Merit Review By This Court

1. The occasional "no lap belt" cases decided by the lower courts over the past decade are atypical of the large number of FMVSS 208 cases involving "no airbag" claims. In a "no lap belt" case, the plaintiff contends that a fully passive, two-point seat belt system was defective under state tort law because it did not have a manual lap belt. As the tiny handful of decisions on this issue suggests, only a relatively small number of automobiles with fully passive, two-point seat belt systems were ever built, and even fewer remain on the road today.

By contrast, a "no airbag" claim — *i.e.*, the contention that an automobile was defective under state tort law because it was not equipped with an airbag — can be made about any automobile built without an airbag, regardless of the type of seat belts in the car. For example, petitioners in this case could have argued that the 1987 Golf was defective because it lacked an airbag. See Pet. 25 (Volkswagen "could have installed a lap belt (or for that matter, an airbag) in Ms. Zimmerman's 1987 Volkswagen Golf * * *"). There are a vast number of automobiles on the road that could be subject to that claim.

Not surprisingly, there are a great many "no airbag" decisions and, as discussed in the petition (at 11-14), the lower courts are divided over whether "no airbag" claims are impliedly preempted by FMVSS 208. Four federal courts of appeals and the Supreme Court of Mississippi have held that

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level of roof strength." 717 F.2d at 1517.

"no airbag" claims are impliedly preempted.[9] Two state courts of last resort, on the other hand, have held that such claims are not preempted.[10] The issue is now pending in at least one federal court of appeals and two state supreme courts.[11]

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[9] See *Montag* v. *Honda Motor Co.*, *supra*; *Pokorny* v. *Ford Motor Co.*, *supra*; *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Cooper* v. *General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 (Miss. May 23, 1996).

Contrary to the suggestion in the petition (at 13-14), the Eleventh Circuit in *Doyle* v. *Volkswagenwerk Aktiengesellschaft*, 81 F.3d 139 (1996), did not repudiate its prior holding in *Taylor*. In *Doyle*, the court of appeals was not reviewing a preemption decision, but rather a district court ruling "[f]inding plaintiffs' claims precluded under Georgia law * * *." *Id.* at 141. The Eleventh Circuit merely certified to the Supreme Court of Georgia "an unanswered question of Georgia law that [was] determinative of th[e] appeal." *Id.* at 140. To the extent that the court in *Doyle* indicated any view regarding preemption of "no airbag" claims, it indicated that *Taylor* had correctly held such claims preempted because of the conflict between such claims and applicable federal law. *Id.* at 142.

[10] See *Ford Motor Co.* v. *Tebbetts*, 165 A.2d 345 (N.H. 1995), cert. denied, 116 S. Ct. 773 (1996); *Wilson* v. *Pleasant*, 660 N.E.2d 327 (Ind. 1995).

[11] See *Harris* v. *Ford Motor Co.*, No. 94-56527 (9th Cir.); *Minton* v. *Honda of Am. Mfg., Inc.*, No. 14949, 1996 WL 402070 (Ohio App. 1996), rev. granted, No. 96-2006 (Ohio Oct. 23, 1996); *Cellucci* v. *General Motors Corp.*, 676 A.2d 253 (Pa. Super. 1996), rev. granted, No. 0379 (Pa. Oct. 22, 1996).

Given the differences in both legal analysis and practical importance between "no lap belt" and "no airbag" cases, it would be most inappropriate for this Court to grant review of a "no lap belt" case if it wishes to enter the preemption debate under FMVSS 208. In light of the extended and unusual history of airbag development and regulation by NHTSA and Congress (see pages 2-8, *supra*), a decision in a "no lap belt" case would not necessarily have broad, dispositive significance for "no airbag" claims. In the case of airbags, there is a lengthy "decision [by the Secretary of Transportation in 1984] not to require airbags," which was affirmed on appeal in *State Farm*, 802 F.2d at 487-489; see U.S. Br. in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995) at 28 ("The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act"). There are separate policy concerns, and a separate regulatory history, with respect to manual lap belts in automobiles equipped with fully passive, two-point seat belt systems.

Accordingly, "the implied preemption analysis that is used in determining a no-airbag case is not equivalent to a claim that the design of a seat belt system is defective." *Alvarado*, 908 S.W.2d at 249. Although Volkswagen believes that the preemption analysis in "no airbag" cases informs (and may control) the decision whether "no lap belt" claims are preempted (*id.* at 253 ("some of the language in no-airbag cases is useful")), some courts have indicated that "the ultimate dispute [is] different" in "no lap belt" cases (*ibid.*). The Solicitor General has taken that same position before this Court (U.S. Br., *Myrick*, at 28 (footnote omitted; emphasis added)):

> [C]ommon law tort actions that imposed liability for failure to install airbags (*as opposed to other types of passive restraint devices*) could, as a practical matter, have compelled manufacturers to install airbags * * *. Because such a result would have frustrated the Secre-

> tary's policy judgment and would have had an adverse effect on safety, we [have] argued * * * that such suits were preempted.

Indeed, petitioners themselves espoused the view in the courts below that Volkswagen's "reliance on 'air bag' cases is misplaced." Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment Based on Federal Preemption at 8. They told the trial court (*id.* at 8-9): "As the court in *Welsh* [v. *Century Prods.*, 745 F. Supp. 313, 316 (D. Md. 1990)], concluded, 'given the unique nature of the statutory and regulatory scheme surrounding the air bag regulation, the numerous cases addressing the issue of preemption in that context are not even particularly helpful' in a different design context." And they made a similar argument to the Idaho Supreme Court. See Appellant's Brief at 36 (distinguishing precedents cited by Volkswagen because "*every one* of those cases involved the federal preemption of the so-called 'no airbag' case") (emphasis in original).

2. The question presented in this case is yet further limited to the issue of *express* preemption of "no lap belt" claims under the Safety Act. Because of its express preemption holding, the Idaho Supreme Court's decision did "not address Volkswagen's contention that [petitioners'] claims are impliedly preempted." Pet. App. 8. Recognizing the limited scope of the decision below, petitioners raise only the issue of express preemption in their petition (Pet. i, 7).

The question of implied preemption under the Safety Act is therefore not properly presented to this Court. See S. Ct. Rule 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992); see also Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE, 348 (7th ed. 1993) ("normally the Court will not consider points or questions not raised below *and* in the petition") (emphasis in original).

As a result, even if this atypical "no lap belt" case were otherwise certworthy (which it is not), it does not raise the preemption issue under the Safety Act on which review might plausibly be warranted on the basis of a conflict in the lower courts (see pages 14-15, *supra*). As petitioners acknowledge, *implied* preemption is the dispositive issue contested in the vast majority of cases — both "no airbag" and "no lap belt" — cited in the petition (at 10-15).

Finally, the narrow express preemption question raised by the petition does not warrant review by this Court because the Idaho Supreme Court's decision predated (and therefore took no account of) this Court's decision on express preemption last Term in *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996). In Safety Act preemption litigation now pending in the lower courts, petitioners' counsel of record has asserted that *Medtronic* represented a substantial change in express preemption law.[12] We disagree that *Medtronic* in fact represents any change in the relevant preemption principles. But if the assertions of petitioners' counsel are correct, then it makes little sense for this Court to review an express preemption ruling issued before *Medtronic* was decided.

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In sum, the *only* issue presented in this case is whether the Safety Act expressly preempts "no lap belt" claims. That issue has been litigated only rarely, is unlikely to arise with any frequency in the future, and has not engendered any conflict among the federal courts of appeals or the state supreme courts. Although the related question whether "no airbag" claims are impliedly preempted has divided some of

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[12] See, *e.g.*, Brief *Amicus Curiae* for Trial Lawyers for Public Justice, *et al.*, in *Minton* v. *Honda of America Mfg., Inc.*, No. 96-2006 (S. Ct. Ohio); Brief *Amicus Curiae* for Trial Lawyers for Public Justice, *et al.*, in *Cellucci* v. *General Motors Corp.*, No. 0379 (S. Ct. Pa.).

the lower courts, that question is not presented here, and a decision in this case would not necessarily dictate the answer to that question. Review of *this* case therefore would be an inappropriate use of this Court's limited resources.

C. Petitioners' Tort Claims Are Expressly Preempted

In any event, review is not warranted because the Idaho Supreme Court's decision is correct. Both aspects of the decision below are supported by longstanding precedents of this Court: The Safety Act's preemption clause includes within its scope state common-law standards, and the Act's "general savings clause" (Pet. App. 8) does not preserve petitioners' tort claims.

1. This Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), eliminates any doubt about whether the safety "standards" referred to in the preemption provision of the Safety Act, 15 U.S.C. § 1392(d), include common-law standards. The Court in *Cipollone* held that the express preemption provision at issue in that case included common-law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" 505 U.S. at 519-524 (plurality) (citation omitted); *id.* at 548-549 (Scalia, J.). The Court stated that it made no difference that the preemption clause "fail[ed] to include a specific" reference to common-law claims. *Id.* at 521; see also *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 661-676 (1993).

The Court's holding in *Cipollone* was premised on its long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformi-

ty contemplated by Congress").[13] And that holding was reaffirmed only last Term in *Medtronic*, where a majority of the Court explicitly endorsed *Cipollone*'s holding that the word "requirements" encompasses state law tort claims for purposes of federal preemption. 116 S. Ct. at 2259-2260 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2262-2264 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part).

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law," "requirements" or "standards" necessarily includes claims based on state common law.[14] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[15] the Feder-

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[13] See also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common-law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

[14] See, *e.g.*, *Lynnbrook Farms* v. *SmithKline Beecham Corp.*, 79 F.3d 620, 627-629 (7th Cir.), cert. denied, 117 S. Ct. 178 (1996); *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179, 182 (8th Cir. 1995); *King* v. *E.I. DuPont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 510 U.S. 913 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 510 U.S. 824 (1993).

[15] See, *e.g.*, *Grenier* v. *Vermont Log Bldgs. Inc.*, 96 F.3d 559 (1st Cir. 1996); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994).

al Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[16] and the Federal Boat Safety Act, 46 U.S.C. §§ 4301, *et seq.*[17]

In light of these precedents, the Idaho Supreme Court correctly concluded that the state "standards" preempted by Section 1392(d) include common-law standards. That decision does not merit review by this Court.

2. In urging this Court to review the express preemption issue in this case, petitioners rely (Pet. 11-15) on cases interpreting the Safety Act's so-called "savings" clause, 15 U.S.C. § 1397(k). Petitioners maintain that, contrary to the holding of the Idaho Supreme Court (Pet. App. 8), this clause shelters all common-law claims from preemption.[18]

a. The text, structure, and legislative history of Section 1397(k) demonstrate that it was not intended by Congress to restrict the scope of express preemption by excluding tort

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[16] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 509 U.S. 906 (1993).

[17] See, *e.g.*, *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995).

[18] Petitioners also spend much of the petition (Pet. 18-22) addressing the spurious argument that this Court's decision in *Cipollone* radically changed federal preemption law and precludes resort to implied preemption analysis in the face of an express preemption clause. This argument was emphatically rejected as entirely "without merit" by a unanimous Court in *Myrick*, 115 S. Ct. at 1487. See also *Medtronic*, 116 S. Ct. at 2259 (rejecting express preemption argument but stating that tort claim might "be pre-empted under conflict pre-emption analysis"). In any event, the argument is irrelevant in this case, which is limited to express preemption.

claims.[19] Instead, the narrow language of Section 1397(k), which states that "compliance with any Federal motor vehicle safety standard * * * does not exempt any person from any liability under common law," by its terms negates only an affirmative common-law defense of compliance with a government standard. Significantly, the clause does not refer to preemption or to the limits of federal supremacy; indeed, as the Safety Act was originally drafted, it was not even included in the part of the Act, Section 1392(d), that addresses federal preemption.[20]

In addition, the text of Section 1397(k) differs significantly from the language employed by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of federal preemption. In the preemption section of the Safety Act, for example, Congress included two savings clauses restricting the scope of preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this*

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[19] The statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. But this Court found express preemption of common-law claims in *Easterwood*, 507 U.S. at 661-676, and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378, 383-391 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[20] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were appropriately placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Significantly, however, Section 1392(d) was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. 103-272, § 1(e), 108 Stat. 943.

> *section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use * * *.

15 U.S.C. § 1392(d) (emphases added). This is the all-encompassing phraseology that Congress has traditionally used in a savings clause, rather than the narrow "compliance with" language of Section 1397(k). See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 97-98 (1993); *Morales*, 504 U.S. at 508.

Perhaps more important, the structure of the Safety Act shows that Section 1397(k) was not intended by Congress to be a sweeping exception to Section 1392(d). Section 1397(k) appears in a wholly separate section of the Act from Section 1392(d), which refers expressly to preemption and which contains two explicit savings clauses. Certainly, if Congress had intended Section 1397(k) to be an expansive third exception to the preemption provision in Section 1392(d), it would have included the language of Section 1397(k) alongside the other express savings clauses in Section 1392(d).

Finally, the legislative history of the Safety Act is further evidence that Section 1397(k) was not intended to carve a gaping hole in the preemption provision. Both the House and Conference Reports contain sections entitled "Preemption," but neither section discusses Section 1397(k). See H.R. Conf. Rep. No. 89-1919, at 16 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2731, 2731-2733; H.R. Rep. No. 89-1776, *supra*, at 17. The House Report mentions Section 1397(k) under the heading "Prohibited Acts and Exemption," and the Conference Report does not deal with it at all. Again, if Congress had intended Section 1397(k) to be a sweeping exception to the preemption provision, it surely would have described it as such in these reports. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991). Rather, as its language indicates, Section 1397(k) was added merely to clarify that the Safety

Act did not create an affirmative defense of compliance with government standards — or, as we next show, that the Safety Act was not intended to occupy the entire field of motor vehicle safety. In this case, Volkswagen never argued that compliance with FMVSS 208 was an affirmative defense.

b. Even if it were viewed as a limitation on the Safety Act's broad preemption provision, Section 1397(k) indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common-law claims could continue to be brought in areas not covered by a federal Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, *supra*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common-law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state-law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil*

Co., 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common-law] remedies" (internal quotations omitted)) could not be read to save common-law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has long adhered to these pronouncements. See, *e.g.*, *Morales*, 504 U.S. at 383-385; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 1397(k) was added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by and not inconsistent with those federal standards.[21]

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[21] This case is a good example: FMVSS 208 expressly grants, for safety reasons (see pages 4-6, *supra*), a choice of several types of safety restraint designs for automobiles. Section 1397(k) would thereby preserve a common-law claim that a restraint system was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Federal Motor Vehicle Safety Standard. On the other hand, that section would not preserve a common-law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted option to utilize a passive restraint system design approved by NHTSA. Such a lawsuit is manifestly inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety policy, by the federal government. Cf., *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).

D. Petitioners Offer No Reason To Distinguish This Case From The Many Other Safety Act Preemption Cases In Which The Court Has Recently Denied Certiorari

This Court has denied certiorari in recent years in every one of the many FMVSS 208 preemption cases in which review was sought.[22] Petitioners offer no reason to distinguish this case from these other cases in which review was denied. Indeed, this case is far less certworthy because of the limited holding of the Idaho Supreme Court and the atypical "no lap belt" claim asserted by petitioners.

What is more, even if there were merit to petitioners' express preemption argument, they would still not prevail on remand. Their tort claims are impliedly preempted by the Safety Act because they conflict with FMVSS 208. See *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). At the time the 1987 Golf was manufactured, FMVSS 208 gave Volkswagen the option to install fully passive, automatic two-point safety belts with no manually-activated lap belts. FMVSS 208 was

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[22] See *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), cert. denied, 117 S. Ct. 61 (1996); *Ford Motor Co.* v. *Tebbetts*, 165 A.2d 345 (N.H. 1995), cert. denied, 116 S. Ct. 773 (1996); *Hyundai Motor Co.* v. *Phillip*, 639 So.2d 1064 (Fla. App. 1994), cert. denied, 115 S. Ct. 901 (1995); *Dykema* v. *Volkswagenwerk AG*, 525 N.W. 2d 754 (Wis. App. 1994), cert. denied, 116 S. Ct. 60 (1995); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 980 (Cal. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), cert. denied, 487 U.S. 1236 (1990).

consciously designed to give manufacturers a choice among various passive restraint systems, rather than to mandate one particular system (see pages 4-6, *supra*). Any state law that removes or restricts a design option granted by federal law conflicts with federal law and is preempted. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982); *Schlotz* v. *Hyundai Motor Co.*, No. C5-96-1207, 1997 WL 10318, at *5 (Minn. App. Jan. 14, 1997) (common law liability for "failure to install lap belts would, in effect, force manufacturers to choose a lap belt option over other options approved under FMVSS 208"). Surely it would frustrate the federal safety policies embodied in FMVSS 208 if state common law could make tortious the use of the VWRA passive restraint system — a system that not only complied with FMVSS 208 but that was expressly approved by NHTSA and lauded by three Secretaries of Transportation (see note 6, *supra*). And it would equally frustrate the federal government's efforts to test the safety, utility, and public acceptability of passive restraints if a state could prevent a manufacturer from putting a fully passive system on the road by imposing massive tort damages for failure to include a manual belt.

In fact, this case presents even stronger grounds for preemption than the ordinary run of FMVSS 208 cases, because one of petitioners' expert witnesses testified at his deposition that Volkswagen should have equipped "100 percent" of its 1987 automobiles with a conventional, active three-point belt system (R. 612). But FMVSS 208 required Volkswagen to equip at least 10% of its 1987-model automobiles with a passive restraint system (see page 4, *supra*). Thus, it would have been impossible for Volkswagen to have complied both with the requirements of FMVSS 208 and with the state standard that petitioners urged in the trial court.

These factors render this case unworthy of review. A decision by this Court on the fact-specific issue presented would have only limited application in other litigation under

FMVSS 208. The Court has already decided a case of modest significance under the Safety Act because of the factual peculiarities of FMVSS 121 and antilock brakes on trucks, see *Myrick*, 115 S. Ct. at 1487-1488. Review of an even more idiosyncratic case involving manual lap belts and the distinctive VWRA passive restraint system in the 1987 Golf would serve very little purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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